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Mike Saredine

**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA**

MIKE SARIEDDINE,
an individual

Plaintiff,

vs.

D&A DISTRIBUTION, LLC (dba
STRICTLY E-CIG)
a Georgia limited liability company;
ELECTRONIC CIGARETTES, INC.
(dba WHOLESALE VAPOR)
a New York corporation;
LA VAPOR, INC.
a California corporation;
MADVAPES HOLDINGS, LLC
a North Carolina limited liability
company;
SHENZHEN IVPS TECHNOLOGY
CO., LTD (fka SHENZHEN SMOK
TECHNOLOGY CO., LTD.)
a Chinese corporation;
VAPETRIK, LLC (dba RIP TRIPPER)
a North Carolina limited liability
company;
LAN AND MIKE INTERNATIONAL
TRADING, INC. (dba VAPORDNA)
a California corporation;

Case: 2:17-cv-02390-DSF-SK

**FIRST AMENDED
COMPLAINT FOR:**

1. **Federal Trademark
Infringement**
2. **False Designation
of Origin 15 U.S.C.**
3. **Common Law Trademark
Infringement**
4. **California Statutory
Unfair Competition**
5. **California Common Law
Unfair Competition**
6. **Breach of Contract**
7. **Contributory Trademark
Infringement**
8. **Breach of the Implied
Covenant of Good Faith
and Fair Dealing**
9. **Intentional Interference
with Contractual
Relations**

DEMAND FOR JURY TRIAL

VAPOR AUTHORITY, INC.
 a California corporation;
 VAPOR RANGE, INC.
 a California corporation; and
 VAPRO SUPPLY, LLC
 a Texas limited liability company; and
 E-CIG GALLERY WHOLESALE
 AND DISTRIBUTION, INC.
 A California corporation; and
 DOES 1 through 10, inclusive,

Defendants.

Plaintiff, Mike Saredidine (“Saredidine” or “Plaintiff”) by and through its undersigned counsel, states as follows for his amended complaint against Defendants Shenzhen IVPS Technology Co., Ltd (“IVPS”) and Shenzhen Smok Technology Co. Ltd. (“Smok”) (collectively, the “Smok Defendants”) and D&A Distribution, LLC, Electronic Cigarettes, Inc., LA Vapor, Inc., MadVapes Holdings, LLC, , Vapetrik, LLC (dba Rip Trippers), Lan & Mike International Trading, Inc. (dba VaporDNA), Vapor Authority, Inc., Vapor Range, Inc., Vapro Supply, LLC., and E-Cig Gallery Wholesale Distribution, Inc. (collectively, the “Distributor Defendants”, and all Defendants, together with Does 1-10, are collectively referred to as the “Defendants”), and alleges as follows:

I. INTRODUCTION

1. This action arises out of Defendants’ intentional and willful decisions to ignore Saredidine’s federal and common law trademark rights in its Alien Vape e-cigarette products, Defendants’ unfair competition in violation of the Lanham Act, and Smok’s intentional and willful breach of a signed settlement agreement between Smok and Saredidine.

2. Since 2008, Plaintiff has manufactured and sold high quality electronic cigarette products to consumers under its federally registered ALIEN VAPE® trademarks.

1 3. In 2016, the Smok Defendants began to market and sell e-liquid
2 vaporizer products under the infringing brand name “Alien Kit.”

3 4. In August 2016, Saredidine notified the Smok Defendants of their
4 infringement. In lieu of filing a lawsuit, Saredidine entered into a binding
5 settlement agreement with the Smok Defendants in October 2016 (the “Settlement
6 Agreement”) (attached hereto as **Exhibit 1**). Under the Settlement Agreement,
7 Saredidine agreed not to sue the Smok Defendants for trademark infringement as
8 long as the Smok Defendants adhered to the Settlement Agreement’s requirements
9 regarding the use of Saredidine’s federally registered ALIEN VAPE® marks.

10 5. Under clause 3 of the Settlement Agreement, Saredidine gave Smok a
11 license for Saredidine’s federally registered ALIEN VAPE® marks for the limited
12 purpose of advertising and selling Saredidine’s “Alien Vape”-branded e-liquid
13 product. Clause 3 set forth requirements that Smok had to follow when advertising
14 and selling Saredidine’s Alien Vape branded e-liquid product. Saredidine retained
15 control of all advertisements and promotions of his Alien Vape branded e-liquid
16 product.

17 6. Under clause 4 of the Settlement Agreement, Saredidine gave Smok a
18 license to use the “Alien Kit” brand name on Smok’s existing vaporizer products
19 only. The license was conditioned on Smok’s compliance with its obligations
20 under the Settlement Agreement. The Settlement Agreement prohibited Smok
21 from advertising or selling any new products using the word “Alien” without
22 Saredidine’s prior written consent.

23 7. In January 2017, in direct violation of the Settlement Agreement, Smok
24 began to market and sell a new e-liquid vaporizer product under the name “Alien
25 Baby” and failed to meet any of its other obligations in the signed Settlement
26 Agreement.

27 8. As soon as he discovered this infringement of his Alien Vape mark,
28 Saredidine repeatedly notified Smok of the infringement and breach of their

1 Settlement Agreement, both informally and through his attorney.

2 9. After repeated appeals for compliance and threats of legal action, Smok
3 finally changed the name of their Alien Baby product to “AL85”.

4 10. However, Smok continues to breach other provisions of the Settlement
5 Agreement. These breaches include: (i) failing to adhere to the advertising
6 requirements set forth in clauses 3.1.2 through 3.1.7 of the Settlement Agreement,
7 (ii) failing to resell and distribute Plaintiff’s Alien Vape e-liquid in accordance
8 with clauses 3.1.9 and 3.1.10; (iii) introducing new “Alien” branded e-cigarette
9 products in violation of clause 3.2.3; (iv) applying for registration of trademark(s)
10 that include the term “ALIEN,” or other confusingly similar terms, in violation of
11 clause 3.2.2; (v) continuing to advertise and sell products under the “Alien Kit”
12 brand, even though Plaintiff has terminated Smok’s license to use this mark, in
13 violation of clause 3.3; and (vi) challenging the validity and enforceability of
14 Sarieddine’s Alien Vape marks, including by filing a counterclaim in this case to
15 cancel the Alien Vape marks, in violation of clause 8; and (vii) encouraging and
16 assisting third parties, including the Distributor Defendants, to contest the validity
17 and enforceability of these trademarks, in violation of clause 8.

18 11. Despite Sarieddine’s federal and common law trademark rights and
19 Smok changing the name of the product, the Distributor Defendants continue to
20 advertise and sell the Smok AL85 vaporizer product under the infringing name
21 “Alien Baby”. The Distributor Defendants are also infringing Sarieddine’s Alien
22 Vape marks by continuing to advertise and sell products under the “Alien Kit”
23 brand name and other confusingly similar names.

24 12. Accordingly, due to the Defendants’ collective blatant and willful
25 infringement, Sarieddine has no choice but to file this lawsuit seeking damages that
26 it has suffered as a result of the Defendants’ unfair competition, trademark
27 infringement, and breach of contract.
28

II. JURISDICTION AND VENUE

13. This Court has subject matter jurisdiction over Sarieddine's Lanham Act claims pursuant to 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1367, and 1338(a).

14. This Court has supplemental jurisdiction over Sarieddine's pendent state law claims pursuant to 28 U.S.C. § 1367 in that the state law claims are integrally interrelated with Sarieddine's federal claims and arise from a common nucleus of operative facts such that the administration of Sarieddine's state law claims with its federal claims furthers the interest of judicial economy.

15. This Court has personal jurisdiction over the Smok Defendants because they do substantial business and sales in this District, and advertise, distribute, offer for sale, and sell the infringing products in this District. The Smok Defendants have purposefully availed themselves and directed their business at opportunities in this District. The Smok Defendants have committed tortious acts in this District against Plaintiff, whose principal place of business is in this District. Additionally, Defendant Shenzhen Smok Technology Co. Ltd. signed a settlement agreement with Plaintiff, which includes a forum selection clause naming California's state and federal courts as the sole and exclusive forum for resolution of disputes over the Settlement Agreement.

16. This Court has personal jurisdiction over LA Vapor, Inc., Lan & Mike International Trading, Inc. (dba VaporDNA), Vapor Authority, Inc., Vapor Range, Inc., and E-Cig Gallery Wholesale and Distribution, Inc. (the "California Defendants") because the California Defendants are located in this District, do substantial business and sales in this District, and advertise, distribute, offer for sale, and sell the infringing products in this District. The California Defendants have purposefully availed themselves and directed their business at the opportunities of this District. The California Defendants have committed tortious acts in this District against Plaintiff, whose principle place of business is located in this District.

1 17. This Court has personal jurisdiction over D&A Distribution, LLC,
2 Electronic Cigarettes, Inc., MadVapes Holdings, LLC, Vapetrik, LLC (dba Rip
3 Trippers), and Vapro Supply, LLC (the “Out-of-state Defendants”) because the
4 Out-of-state Defendants do substantial business and sales in this District and
5 advertise, distribute, offer for sale, and sell the infringing products in this District.
6 The Out-of-state Defendants have purposefully availed themselves and directed
7 their business at the opportunities of this District. The Out-of-state Defendants
8 have committed tortious acts in this District against Plaintiff, whose principle place
9 of business is located in this District.

10 18. Venue is proper in this District under 28 U.S.C. § 1391.

11 **III. PARTIES**

12 19. Plaintiff Mike Saredine is an individual residing in the county of Los
13 Angeles, California.

14 20. Upon information and belief, Defendant DNA Distribution, LLC is a
15 Georgia limited liability company with an address of 202 Bourne Blvd., Ste 180,
16 Savannah, GA 31408.

17 21. Upon information and belief, Defendant Electronic Cigarettes, Inc. is a
18 New York corporation with an address of 279 Front St., Binghamton, NY 13905.

19 22. Upon information and belief, Defendant LA Vapor Inc. is a California
20 corporation with an address of 1305 John Reed Court, City of Industry, CA 91745.

21 23. Upon information and belief, Defendant Madvapes Holdings, Inc. is a
22 North Carolina corporation with an address of 130 Oak Park Drive, Ste A,
23 Mooresville, NC 28117.

24 24. Upon information and belief, Defendant Shenzhen IVPS Technology Co.
25 Ltd. is a Chinese corporation with an address of 3rd Floor, No. 15, Kejibei 2nd
26 Road, Nanshan District, Shenzhen, China

27 25. Upon information and belief, Defendant Shenzhen Smok Technology Co.
28 Ltd. is a Chinese corporation with an address of 3rd Floor, No. 15, Kejibei 2nd

1 Road, Nanshan District, Shenzhen, China.

2 26. Upon information and belief, Defendant Vapetrik, LLC is a North
3 Carolina limited liability company with an address of 5448 Apex Peakway #147,
4 Apex, NC 27502-3924.

5 27. Upon information and belief, Defendant Lan & Mike International
6 Trading, Inc. (dba VaporDNA) is a California corporation with an address of
7 20435 Gramercy Place, Ste 101, Torrance, CA 90501.

8 28. Upon information and belief, Defendant Vapor Authority, Inc. is a
9 California corporation with an address of 9187 Clairemont Mesa Blvd., Ste 596,
10 San Diego, CA 92122.

11 29. Upon information and belief, Defendant Vapor Range, Inc. is a
12 California corporation with an address of 15210 S. Western Ave., Gardena, CA
13 90249.

14 30. Upon information and belief, Defendant Vapro Supply, LLC is a Texas
15 limited liability company with an address of 4150 Freidrich Lane, Ste G, Austin,
16 TX 78744-1052.

17 31. Upon information and belief, Defendant E-Cig Gallery Wholesale and
18 Distribution, Inc. is a California corporation with an address of 9273 Research
19 Drive, Irvine, CA 92618

20 32. Plaintiff is ignorant of the true names and capacities of the defendants
21 sued as Does 1 to 10, inclusive, and therefore sues these defendants by such
22 fictitious names. Plaintiff will amend this complaint to allege their true names and
23 capacities when ascertained.

24 **IV. FACTS COMMON TO ALL CLAIMS FOR RELIEF**

25 **Plaintiff's Successful Alien Vape® Brand and Trademarks**

26 33. Since 2008, when Plaintiff first began selling high quality e-cigarette
27 products in California, and later in other states, Plaintiff has invested tremendous
28 time and resources into marketing and promoting e-liquids, vaporizers and related

1 e-cigarette products under the trademark ALIEN VAPE®.

2 34. Plaintiff advertises its goods on its website at www.alienvape.com,
3 among other forms of advertising and promotion.

4 35. The ALIEN VAPE® Marks are inherently distinctive, and have
5 developed widespread brand recognition among consumers in California and in
6 many other states as the source of high-quality e-liquid products.

7 36. As a result of Plaintiff's high-quality products, extensive advertising and
8 promotion of the brand, and continuous and widespread use in California and other
9 states, the ALIEN VAPE® Marks are extremely strong, distinctive, and have
10 acquired extensive and valuable goodwill with consumers as an identifier of
11 superior quality e-liquid products.

12 37. Plaintiff owns two United States federal trademark registrations for the
13 ALIEN VAPE® Marks:

- 14 • U.S. Trademark Registration No. 4997336 for the mark ALIEN VAPE® for
15 "Electronic cigarette liquid (e-liquid) comprised of flavorings in liquid form
16 used to refill electronic cigarette cartridges; Electronic cigarette liquid (e-
17 liquid) comprised of propylene glycol; Electronic cigarette liquid (e-liquid)
18 comprised of vegetable glycerin; Electronic cigarettes; Oral vaporizers for
19 smokers" in International Class 34; and
- 20 • U.S. Trademark Registration No 4517249 for the mark ALIEN VAPE.
21 VAPE JUST GOT REAL!® (and "alien head" design) for "Electronic
22 cigarettes vaporizers for alternative smoking" in International Class 34
23 (collectively, the "ALIEN VAPE® Registrations")

24 38. The ALIEN VAPE® Registrations are prima facie evidence that the
25 ALIEN VAPE® Marks are valid, and that Plaintiff is entitled to the exclusive use
26 of the marks in commerce throughout the United States for the goods listed in the
27 registrations.

28 39. Plaintiff also has extensive common law rights in the ALIEN VAPE®

1 Marks due to his continuous use of the marks in commerce in California and in
2 other U.S. states since 2008.

3 40. The ALIEN VAPE® Marks have become well-known with Plaintiff's
4 customers, and have developed substantial goodwill and association in the mind of
5 the consumer, due to Plaintiff's extensive marketing, promotion, and use of the
6 ALIEN VAPE® Marks. On the basis of the inherent distinctiveness of the ALIEN
7 VAPE®, the public differentiates Plaintiff's products from others on the market.

8 **Smok's Infringement of Plaintiff's Trademarks and Settlement Agreement**

9 41. Sometime in 2016, the Smok Defendants began selling an e-cigarette
10 device kit using the brand name "Alien Kit," which is a highly similar trademark to
11 Plaintiff's ALIEN VAPE® Marks.

12 42. Around August 2016, Plaintiff discovered that the Smok Defendants
13 were selling the Alien Kit products.

14 43. Plaintiff brought the infringement to the attention of the Smok
15 Defendants and discussed the issue with Smok's Sales Manager, Elaine Tang, over
16 the phone. Plaintiff and Smok then entered into settlement negotiations over the
17 next two months.

18 44. In exchange for Plaintiff's license to continue using the "Alien" name on
19 its existing Alien Kit products, Smok signed a Settlement Agreement with Plaintiff
20 in which Smok agreed, among other things, to:

- 21 • Respect and never challenge Plaintiff's Alien trademarks;
- 22 • Spend a minimum of \$15,000 per month for 18 months purchasing
- 23 Plaintiff's Alien Vape-branded e-liquids;
- 24 • Advertise Plaintiff's Alien Vape-branded e-liquid products on the front
- 25 page of Smok's website, online stores, on Smok's social media
- 26 accounts, and through Smok's marketing emails to customers;
- 27 • Never to adopt any new trademarks anywhere in the world that include
- 28 the term "Alien" or any confusingly-similar term, or to use the term

1 “Alien” in connection with any new products, aside from their use of
2 the word in their existing “Alien Kit” product;

- 3 • To pay attorneys’ fees to Plaintiff if is the prevailing party for any
4 litigation that relates to the Settlement Agreement.

5 45. Over the next few months, Plaintiff was forced to contact multiple Smok
6 employees on numerous occasions, requesting that Smok simply comply with the
7 terms of the Settlement Agreement. These requests included numerous pleas for
8 Smok personnel to:

- 9 • Place the initial monthly order of Alien Vape e-liquids agreed upon in the
10 settlement;
- 11 • Place subsequent monthly orders of Alien Vape e-liquids or pay the
12 substitute amounts agreed upon in the settlement;
- 13 • To display Plaintiff’s banner advertisement on the front page on the Smok
14 website www.smoktech.com;
- 15 • To send the agreed-upon email marketing messages to Smok’s customer
16 mailing list;
- 17 • To share Plaintiff’s images to Smok’s social media followers.

18 46. The Settlement Agreement also contains a provision (Section 7.1)
19 wherein if Smok fails to meet the minimum required purchase for two consecutive
20 months, Smok would pay Plaintiff the full value of the monthly purchase over the
21 18-month term within 30 days. The monetary value of this provision, \$15,000 over
22 17 months, is a total of USD \$255,000.

23 47. Additionally, Section 7.1 also provides that if Smok breaches the terms
24 of the Agreement dealing with Smok’s advertisement of Plaintiff’s products, Smok
25 agreed to pay Plaintiff \$5,000 per month in which they failed to satisfy those
26 requirements. Smok failed to uphold the terms of the agreement in every month
27 since signing. Therefore, the monetary value of \$5,000 per month over 18 months
28 is a total of USD \$90,000.

1 48. Smok personnel have continually requested adjustments to the already-
2 signed contract, and demanded that Plaintiff pay for expenses related to sending
3 emails to Smok's mailing list and other concessions that were not contemplated in
4 the Settlement Agreement.

5 49. To date, only a single monthly payment of \$15,000 has been made to
6 Plaintiff (in November 2016).

7 50. It has been over four months since Smok's last payment, triggering the
8 clause for Smok to pay Plaintiff out \$255,000 for the remaining 17 months.

9 51. Together, with the \$90,000 Smok owes Plaintiff for its failure to
10 advertise and promote pursuant to the Settlement Agreement, Smok owes Plaintiff
11 \$345,000 for breach of those two clauses alone.

12 52. Additionally, in early January 2017, Plaintiff became aware that Smok
13 planned to launch a new e-cigarette product, the Alien Baby, a clear violation of
14 Section 3.2 of the Settlement Agreement.

15 53. Plaintiff sent multiple emails to Smok personnel pleading with them not
16 to advertise or release this infringing new product that would also clearly breach
17 the Settlement Agreement.

18 54. On January 5, 2017, Plaintiff and Smok discussed the possible terms of a
19 partnership regarding Smok's use of the Alien Baby name over WeChat and
20 Skype.

21 55. While those negotiations were ongoing and despite Plaintiff's pleas, the
22 Smok Defendants moved forward with the advertisement of the upcoming "Alien
23 Baby" product on their website and on social media.

24 56. Throughout early January 2017, Plaintiff continued to alert Smok
25 personnel that the infringing Alien Baby name was on their website and social
26 media. Smok personnel eventually responded, claiming that they had removed the
27 infringing images, and renamed the Alien Baby product to "AL85".

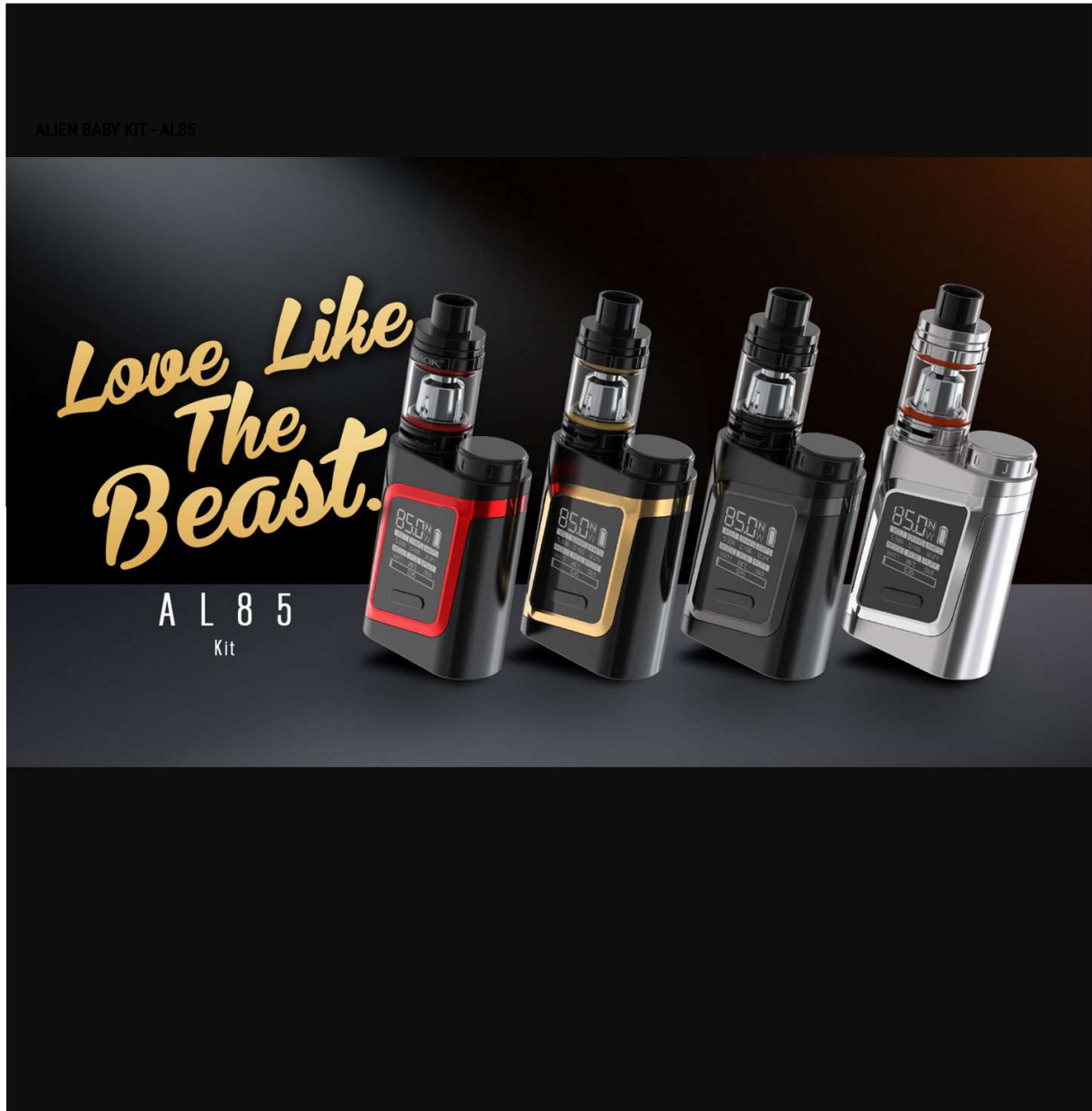
28 57. Despite purportedly having renamed the "Alien Baby" product to

1 “AL85”, Smok continues to use the infringing “Alien Baby” name.

2 58. At least as late as January 4, 2017, the text of the URL for the AL85 page
3 and the meta-tag description of the AL85 product page on Smok’s website contains
4 the infringing “Alien Baby” name. This is shown from the printout of the AL85
5 product page below:

6 1/4/2017

Alien Baby Kit - AL85 - SMOK® Being with you for all great vaping time!



26 <http://www.smoktech.com/kit/alien-baby-al85>

1/8

27 59. On January 5, 2017, Smok sent a marketing email to customers
28 announcing their new product, using the infringing “Alien Baby” name:

Alien Vape Mail - [AD]Alien Baby - AL85 Kit



Alien Vape <info@alienvape.com>

[AD]Alien Baby - AL85 Kit

2 messages

SMOK <service@smoktech.com>
Reply-To: service@smoktech.com
To: info@alienvape.com

Thu, Jan 5, 2017 at 7:24 PM

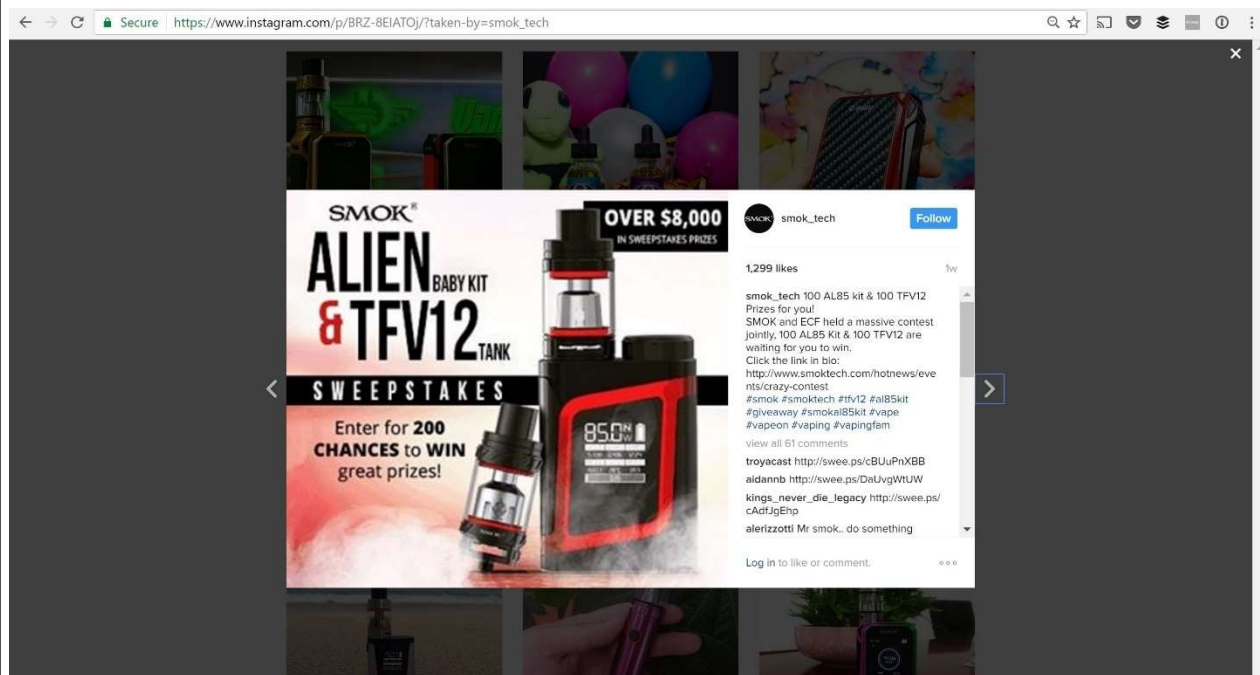


LOVE LIKE THE BEAST

Alien Baby Kit, consists of AL85 mod and TFV8 Baby tank features with delicate design, smooth streamline and integrated functional buttons. You would enjoy thoughtful experience and innovative design from SMOK when its 85W output power combines with Cloud Beast TFV8 Baby tank. Vaping, just enjoy it.

60. Additionally, an Instagram post made on or around March 8, 2017 on Smok's official smok_tech account contains the infringing name, advertising a sweepstakes giveaway featuring the AL85, but referring to the device as the "Alien

Baby Kit”:



61. Also on or around March 9, 2016, the official Smok Instagram Account profile contained a link to an e-cigarette online discussion forum thread that clearly used the infringing “Alien Baby” name in the URL, in connection with a giveaway of the AL85 e-cigarette devices. See screenshot below:



smok_tech

Follow

1,766 posts

113k followers

258 following

SMOK TECHNOLOGY Customer Service:

support@smoktech.com Promotion:

marketing@smoktech.com Wholesale:

manager@smoktech.com | Newest: 100 AL85 kit & 100

TFV12 for you [www.e-cigarette-](http://www.e-cigarette-forum.com/forum/threads/winning-is-back-again-massive-8000-of-smok-alien-baby-kits-up-for-grabs.792047)

[forum.com/forum/threads/winning-is-back-again-massive-8000-of-smok-alien-baby-kits-up-for-grabs.792047](http://www.e-cigarette-forum.com/forum/threads/winning-is-back-again-massive-8000-of-smok-alien-baby-kits-up-for-grabs.792047)



1 62. On April 5, 2017, Smok circulated on its Instagram Page another
2 marketing material push identifying for its “Alien Baby AL85”.

3 63. On April 16, Smok shared another promotional advertisement referring to
4 its AL85 vaporizer as the “SMOK ALIEN MINI AL85 KIT”.

5 64. On April 23, Smok again called their new vaporizer the “Alien 85”.

6 65. On May 1, 2017, Smok posted to its Instagram Page the AL85 and used
7 the #alien hashtag.

8 66. On May 4, 2017, Smok posted an image of their AL85. One commenter
9 asked: “What is that called”. There were two immediate responses from separate
10 commenters: “Alien mini” and “The baby Alien AL85”.

11 67. On May 9, 2017, Smok posted yet another promotional photograph on its
12 official Instagram account of its AL85 product and used the #alien hashtag.

13 68. Since Smok unlawfully released its Alien Baby vaporizer, Plaintiff has
14 received dozens of emails from confused, misdirected customers asking about
15 Smok’s infringing Alien vaporizers.

16 69. These uses of the “Alien Baby” name constitute not only a blatant
17 infringement of Plaintiff’s registered ALIEN VAPE® Marks, but also a willful
18 breach of the Settlement Agreement signed by Smoke just months before.

19 70. Smok also willfully breached the Settlement Agreement by refusing to
20 adhere to the Settlement Agreement’s requirements for advertising and selling
21 Plaintiff’s Alien Vape-branded e-liquid. On February 6, 2017, Smok informed
22 Plaintiff that Smok would no longer be allowed to sell e-liquid products, due to a
23 notice from the “Industry and Trade Commerce Bureau”. However, Section 7.1 of
24 the Settlement Agreement explicitly provides that if Smoke does not purchase and
25 advertise Plaintiff’s e-liquid products, it will pay Plaintiff a total of \$20,000 per
26 month. Furthermore, the contract contains no Force Majeure or other similar
27 clauses excusing Smok’s performance.

28 71. Due to Smok’s material breaches, Plaintiff terminated the Distribution

1 Term in January 2017 pursuant to Section 6.1 of the Contract. Smok's continued
 2 use of the term "Alien" on its e-cigarette products, in violation of Settlement
 3 Agreement's provisions restricting such use, constitutes willful infringement of
 4 Sarieddine's federally registered trademarks.

5 72. Since the commencement of this case, Smok has continued to breach the
 6 Settlement Agreement. On April 13, 2017, about two weeks after Plaintiff filed
 7 this action, Smok filed with the USPTO a brand-new trademark application for
 8 "SMOK Alien Kit" for electric cigarettes. Smok also applied for other "ALIEN"
 9 trademark registrations in countries outside the United States, including filing
 10 trademark applications in China for "Alien Mod" and "Alien Kit." Smok's filing
 11 of these trademark applications violates Section 3.2.2 of the Settlement Agreement,
 12 which prohibits Smok from applying for registration anywhere in the world of any
 13 trademark that includes the term "Alien," or any confusingly similar term.

14 73. On May 31, 2017, Smok sent a letter to Plaintiff, announcing that it was
 15 terminating the Settlement Agreement in its entirety. However, pursuant to
 16 Section 6 of the Settlement Agreement, only the Distribution Term can be
 17 terminated. Section 6 expressly states that the rest of the Settlement Agreement
 18 remains in effect following the expiration of the Distribution Term. By
 19 announcing that Smok would no longer follow the Settlement Agreement, Smok's
 20 letter of May 31, 2017 is a breach of Section 6.

21 74. Smok has also contested the validity and enforceability of Plaintiff's
 22 Alien Vape Marks, including by filing a counterclaim in this action to cancel
 23 Plaintiff's Alien Vape Marks. In addition, upon information and belief, Smok also
 24 encouraged and assisted third parties, including the Distributor Defendants, in
 25 contesting the validity and enforceability of Plaintiff's Alien Vape Marks. This
 26 conduct constitutes a clear breach of clause 8 of the Settlement Agreement, in
 27 which Smok had agreed not to challenge the validity or enforceability of the Alien
 28 Vape Marks, or support, aid, or assist any third party in contesting the validity or

enforceability of these marks.

Infringement by Distributor Defendants

75. On March 9, Smok informed Plaintiff that they had notified retailers that Smok had ceased usage of the “Alien Baby” name in connection with the AL85 product.

76. Despite this, numerous e-cigarette retailers and reviewers continue to refer to the AL85 device as the “Alien Baby” or “Baby Alien”, a clear infringement of Plaintiff’s trademark rights to “Alien” for vaporizers and e-cigarette products. Screenshots of representative examples of this infringement on the Distributor Defendants’ websites and marketing emails are shown below:

The screenshot shows the website for Strictly E-Cig. The main product displayed is the SMOK AL85 ALIEN BABY BOX MOD. The product is a black and gold e-cigarette device. The website header includes navigation links: About | Contact | Payments & Shipping | Returns & Refunds. The main navigation bar lists categories: JUICE, HARDWARE, ACCESSORIES, BATTERIES, BOX MODS, COILS, STARTER KITS, TANKS, SALE, NEW, and COMING SOON. The product page features a large image of the device, a zoom button, and the SMOK logo. Below the image is a table with product options and their prices.

Options	Price	MSRP	In stock	Quantity
Gold	Please login	-	333	Please login
Silver	Please login	-	425	Please login
Black/Red	Please login	-	389	Please login
Gunmetal	Please login	-	451	Please login

DETAILS
The SMOK AL85 is a small mod that packs an 85-watt punch. The large, clear OLED screen displays a detailed view of all the information you need, including power, temperature, battery status, and more. Unlike many compact mods, the AL85 uses a removable 18650 battery instead of a built-in battery, giving you more control.

INCLUDES

- 1 AL85 Box Mod
- 1 USB Cable

FEATURES

- Dimensions: 71mm x 48mm x 27mm
- Wattage range: 1W - 85W
- Temperature range: 200F - 600F
- OLED display
- Powered by 1 18650 battery (sold separately)

source: D&A Distribution, LLC (dba Strictly E-Cig)

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www.wholesalevapor.com/regulated-devices-c-2_9/smok-al85-mod-p-1255.html

Welcome Guest! Would you like to [log yourself in?](#)

US DOLLAR ENGLISH FINANCING REGISTER CART

Wholesale Vapor THE #1 USA WHOLESALE SUPPLIER OF ELECTRONIC CIGARETTES & ACCESSORIES 1-800-332-0916

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Product 32/39

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Smok AL85 Mod ★★★★★

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Products Description Additional Information Reviews (0)

*This is for the AL85 mod only. Tank not included.

AL85 Mod

Size: 71*48*27mm
Weight: 120g
Power Range: 1-85w
Voltage Range: 0.35v-8.0v
Resistance Range: 0.10Ω-3.00Ω (VW mode)/0.060Ω-3.00Ω (TC mode)
Temperature Range: 200-600°F/100-315°C

Smok Alien Baby-AL85 Kit comes with:

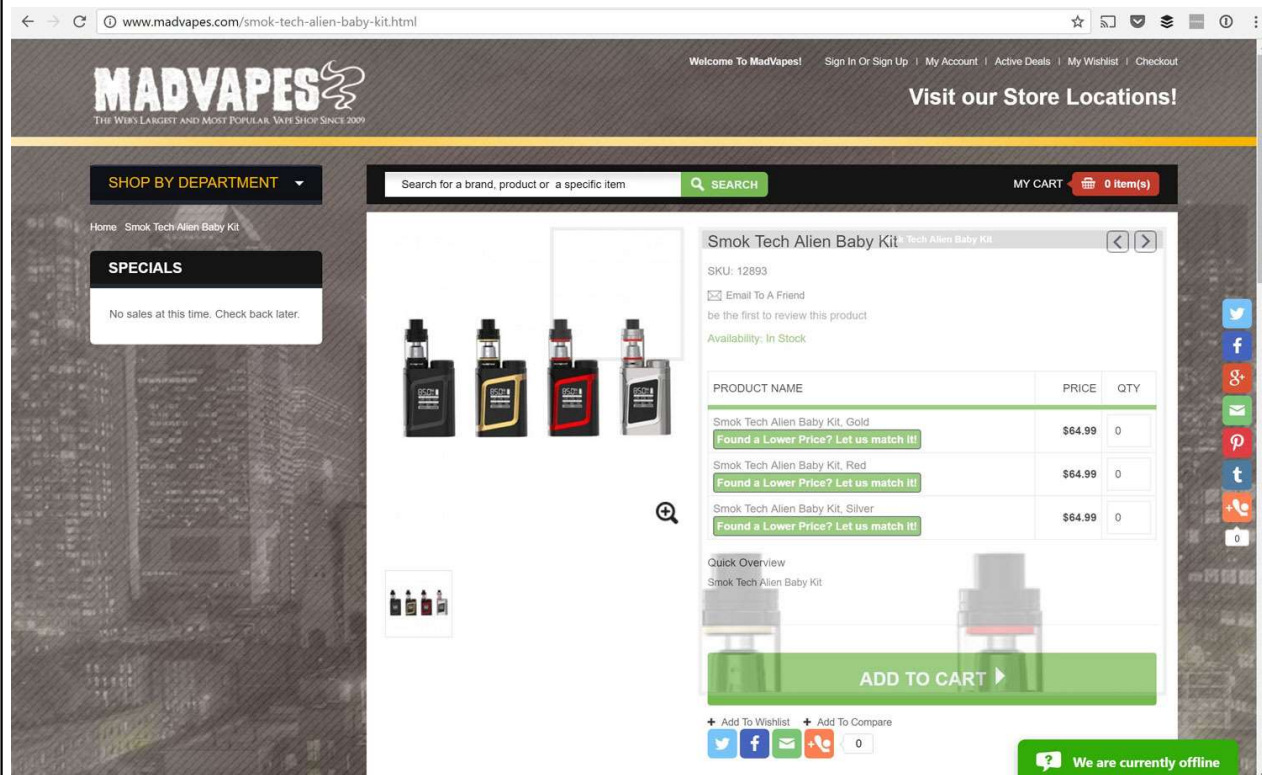
- 1pc AL85 Mod
- 1pc USB Charge/Upgrade Cable
- 1pc User Manual
- Spare Parts

*This is for the AL85 mod only. Tank not included.

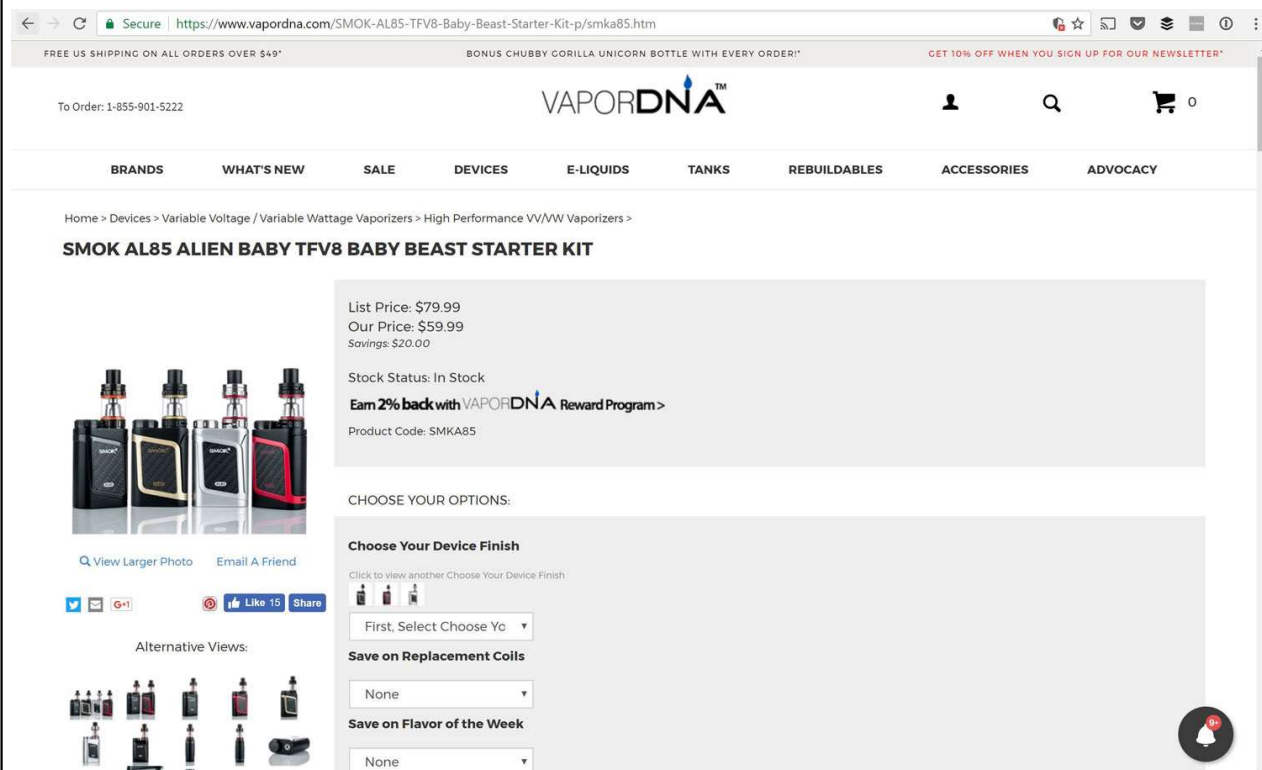
source: Electronic Cigarettes, Inc. (dba Wholesale Vapor)



source: LA Vapor, Inc.



source: MadVapes Holdings, LLC



source: Lan & Mike International Trading, Inc. (dba VaporDNA)

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Secure | <https://www.vaporaauthority.com/products/genuine-smoktech-al85-kit-alien-baby-baby-beast-tank>

We Offer Free Shipping on All Orders Over \$75!

(888)-927-VAPE (8273)

STARTER KITS BATTERIES RDA/RBAS TANKS ACCESSORIES E-LIQUID APV/MODS COILS/HEADS

HOME > GENUINE SMOK™ AL85 KIT (ALIEN BABY 85W TC & BABY BEAST TANK)

SECURE CHECKOUT 60-DAY WARRANTY GUARANTEED AUTHENTIC SAME-DAY SHIPPING

sale

GENUINE SMOK™ AL85 KIT (ALIEN BABY 85W TC & BABY BEAST TANK)

BY SMOKTECH

★★★★★3 reviews

List Price: \$79.99

Sale Price: \$59.99

COLOR Select a Color

QTY 1

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Norton SHOPPING GUARANTEE

ID Theft Protection

Purchase Guarantee

Lowest Price Guarantee

...as a thank you for buying from us.

Tweet G+ Like 0

source: Vapor Authority, Inc.

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Secure | <https://www.vaporrange wholesale.com/Smok-Alien-Baby-AL85-Kit-p/smok-baby-al85-kit.htm>

FREE SHIPPING ON ORDERS OVER \$1,500* (click for coupon code)

VAPOR RANGE WHOLESALE

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Accessories Batteries & Chargers Blow Out Devices Juice Rebuildables Replacement Coils

Tanks Vape Packaging

Home > Devices >

SMOK ALIEN BABY AL85 KIT

Original Price: (Members Only)

Price Breaks:

Pricing is viewable to Members Only.

Note: Discounts for quantity are per color / style / finish. You will need to order the listed quantity of a specific color to receive a discount. Quantity discounts shown above will be automatically applied to your order.

source: Vapor Range, Inc.

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Home / E-Cigs / Kits / **SmokTech AL85 (Baby Alien) Kit**

SmokTech AL85 (Baby Alien) Kit

To view pricing login to an approved account or complete the application process.

Product Description

The SmokTech AL85 (Baby Alien) Kit includes an AL85 Mod and a TFV8 Baby Beast Tank. The AL85 Mod has an 85W power maximum, a 600F temperature maximum, and a 0.06 Ohm resistance compatibility. This Baby Alien mod is compact and comfortable, featuring an 18650 top battery slot and Hard, Norm, and Soft drawing effects. The AL85 Mod pairs perfectly with the TFV8 Baby Beast tank, creating an ideal setup for vaping on-the-go.

SmokTech AL85 (Baby Alien) Kit

AL85 Mod Features:

- Wattage Range: 1 - 85W
- Voltage Range: 0.35V - 8.0V
- Temperature Range: 200 - 600F
- Resistance Range: 0.06 Ohm - 3.0 Ohm
- Dimensions: 71 x 48 x 27mm
- Hard / Norm / Soft drawing effects
- Top battery slot
- Requires 1x 18650 battery
- OLED screen
- Detailed vaping data
- Firmware upgradeable

TFV8 Baby Beast Features:

You May Also Like

SmokTech V8 Baby - M2 Coils [5-pack]
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SmokTech V8 Baby - Q2 Coils [5-pack]
Login for Pricing

source: Vapro Supply, LLC

White with Black Alien Kit - Hitting the vape industry by "storm"

1 message
E-Cig Gallery Wholesale and Distribution <orders@e-ciggallery.com>
Reply-To: orders@e-ciggallery.com
To: [REDACTED]

Fri, Feb 3, 2017 at 4:28 PM

Don't miss out on receiving our emails! We ask that you reconfirm your subscription to ensure you continue receiving emails from us. [Click here](#) to confirm your interest in receiving our emails.
You may [unsubscribe](#) if you no longer wish to receive our emails.

You want it, we've got it. Quality and convenience that your shop needs. Get all of your hardware and e-liquid in one place.



source: E-Cig Gallery Wholesale and Distribution, Inc.

77. Defendant Vapetrik, LLC (dba Rip Trippers) operates a YouTube channel in which they review e-cigarette products.

78. The Rip Trippers YouTube channel contains a video published February 3, 2017, named "The SMOK AL85 Quick Glance! Its The Baby Alien Starter Kit!", in which the AL85 kit from Smok is reviewed (the "Video")¹.

79. In the description of the Video, there are links to www.bevapehappy.com and www.vapordna.com to purchase. The links,

<https://www.bevapehappy.com/?rfsn=167690.4700b> and

<http://www.vapordna.com/?Click=106881> are "affiliate" links that attribute sales of the AL85 product to Vapetrik, LLC. Vapetrik, LLC then receives a commission for each sale of the AL85 product. The code following the main URLs in each of these links is Vapetrik, LLC's affiliate code, used to track sales made when a user visits the site through that link.

80. The Distributor Defendants have also infringed Plaintiff's trademark

¹ <https://www.youtube.com/watch?v=7CP9SBuhohQ>.

rights to “Alien” for e-cigarette products by continuing to sell, distribute and advertise Smok’s products under the “Alien Kit” brand name and other confusingly similar names. Screenshots of representative examples of this infringement on the Distributor Defendants’ websites and marketing emails are shown below:



source: D&A Distribution, LLC (dba Strictly E-Cig)

New Smok Alien Colors - G150 and GX350 Restock - Smok Coil Restock - Tpriv Restock

1 message

Wholesale Vapor <info@wholesalevapor.com>
Reply-To: Wholesale Vapor <info@wholesalevapor.com>

Tue, Jul 18, 2017 at 1:14 PM

[View this email in your browser](#)



source: Electronic Cigarettes, Inc. (dba Wholesale Vapor)

ALIEN KIT 220W
By Smok



ALIEN KIT
By Smok



DEAL OF THE DAY

https://mail.google.com/mail/u/3/?ui=2&ik=70c3ba1e32&jsver=EaIL6uzd89M.en.&view=pt&as_from=lavaporwholesale%40gmail.com&as_has=alien&... 7/35

9/27/2017 Gmail - Sigel J150 Plus | Swallowtail Paint & Resin | KAOS Spectrum | Alien Kit Green/Gold | SLYDR Coils | IPVD4 & TFV8 Baby Tank Rainb...

TEXT "LAVAPOR" TO 48421 FOR OFFERS AND PROMOTIONS!

source: LA Vapor, Inc.

SMOK Alien 220W TC TFV8 Baby Beast Kit | Vape Kits
Bonus Chubby Gorilla Unicorn Bottle With Every Order! (<https://www.vapordna.com/Articles.asp?ID=293>)
Home (<https://www.vapordna.com/>) > Devices (<https://www.vapordna.com/Devices-s/1814.htm>) > Starter Kits (<https://www.vapordna.com/St-s/1820.htm>) >

SMOK ALIEN 220W TC AND TFV8 BABY BEAST FULL KIT



(<https://cdn3.volusion.com/myrsg.dceqt/v/vspfiles/photos/SMALEN-11T.jpg?1506516993>)

List Price: \$79
Our Price: \$59
Savings: \$20.00

Stock Status: In Stock
Earn 2% back with VAPORDNA
Product Code: S

CHOOSE YOUR

Choose Your

Click to view another
Device Finish



source: Lan & Mike International Trading, Inc. (dba VaporDNA)

(888)-927-VAPE (8273)

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THE ONE STOP SHOP FOR ALL YOUR VAPING NEEDS

MENU



GENUINE SMOK™ ALIEN FULL KIT (220W TC & BABY BEAST TANK)
List Price: \$99.99




GENUINE SMOK™ AL85 KIT (AL85 MOD & BABY BEAST TANK)
List Price: \$79.99

source: Vapor Authority, Inc.

Home (<https://www.vaporrangle.com/>) > Devices (<https://www.vaporrangle.com/Mods-s/1817.htm>) >

SMOK Alien TFV12 Combo



<https://cdn3.volusion.com/nxfq.xbpj/v/vspfiles/photos/Smok-Alien-TFV12-Bundle-2.jpg?1504788418>

VIEW LARGER IMAGE (<https://cdn3.volusion.com/nxfq.xbpj/v/vspfiles/photos/Smok-Alien-TFV12-Bundle-2.jpg?1504788418>) **EMAIL A FRIEND** ([/EmailaFriend.asp?ProductCode=Smok%2DAlien%2DTFV12%2DBundle](#))

List Price: \$89.95
Sale Price: \$59.95
Savings: \$30.00

You'll earn **59 points**
What does this mean? (<https://www.vaporrangle.com/MyRewards.asp>)

CHOOSE YOUR OPTIONS:

COLOR
First, Select Color ▼

Qty: 1

ADD TO CART ►

source: Vapor Range, Inc.



SmokTech New Colors for Alien 220 Kit

source: Vapro Supply, LLC



source: E-Cig Gallery Wholesale and Distribution, Inc.

Consumer Confusion

81. Evidence of actual consumer confusion abounds, as Plaintiff has received numerous emails from Smok's customers asking about the Alien Kit and Alien Baby devices, and about vaporizers in general, which Plaintiff does not currently sell (but plans to start selling again soon).

82. Examples of this confusion from customer emails include (emphasis added, and all typos and errors left in their original format):

- November 1, 2016 – "I bought **one of your vapes, 220 Watt gold and black** at eb vape attic in Philipsburg PA. I went to twist the top piece off (the part containing the juice) and the part that connects the box and the top piece twisted and came with it and pulled the wire. I am unsure why this happened and so is the owner of the shop. I paid near to \$300 and didn't have it for three months. **They told me to contact you about this problem** to see if I could get the problem fixed."

(Demonstrating confusion both by the consumer and the retailer as to the source of the “Alien”-branded e-cigarette product).

- Dec 28, 2016 – “I have only had my Allen [sic] mod for 1 day and it is already tasting metallic . .why is this?? The coil can't be burn pur already!!!”
- Jan 20, 2017 – “I bought the **Smok Alien 220W** tc from you but the only thing is the screen is very very dim but it's at 100% contrast and you can only see the screen if your in the dark with the lights off. I love my Smok Alien but it makes it difficult to see what anything on it is. So, is there anyway I could make it a lot brighter to look what it's supposed to look like?!”
- Feb 7, 2017 – “Hello, I have a complaint. I purchased my vape on Black Friday. I love this vape but it has a defect. Something is wrong with the charging portal. Can someone please assist me with this matter? I feel it cost too much to have this issue. Thank you”
- Feb 15, 2017 – “I just bought my vape used, and I am trying to charge it. It says its charging, and I left it plugged in for 4 hours, but it still says low battery. Is this a battery issue or a mod issue?”
- Feb 17, 2017 – “I bought an alien mod a few weeks ago and I have never dropped my mod ever and It kept reading ohms too low and I opened up the top part with the proper screw and there is a wire snapped I have the warranty card could I get a new one? Thanks.”
- Feb 17, 2017 – “I would like to ask if it's possible **to send smok alien vape** to a country that has Vape's as an prohibited item in anyway ??”
- Feb 20, 2017 – “Hi I bought an alien 220w tc. I love the product except the tank leaks all the time it's installed properly and it closes all the way. I'm very unhappy with this I bought it less then a month ago I still have the receipt I don't over fill the tank of anything. [...] But I don't want to spend more money and none of them match my mod, I hope there is something

1 you can do because of know **I would not recommend your product** nor
 2 will I buy another tank to have the same exact problem!”

3 (Demonstrating the harm that the customer association with Smok’s
 4 infringement is causing to Plaintiff’s brand).

- 5 • Feb 21, 2017 – “Hi I brought one of your 220 w alien vape I looking to get a
 6 tank and coil that goes up to the 220w are able to point me in the right
 7 direction please”
- 8 • Feb 25, 2017 – “Hello, So I have the **alien smok kit** with the baby beast. My
 9 baby best drip tip broke and would like to get a new tip. Is there anyway I
 10 can buy a new tip that is the exact same as the one that came with it?”
- 11 • Feb 28, 2017 – “Hi names Phil and I'm a fan of the **smok alien 220w** tc.
 12 vape mod and the baby beast tank I been looking for a great e-juice to vape
 13 that's equal in flavor and cloud production. I read a lot about the roswell and
 14 area 51 juices on your website after I got an email about them I'm interested
 15 in trying these e-juices but unfortunately I'm outta state.”

16 (Showing that Smok’s usage of the infringing “Alien” mark is causing
 17 confusion as to the source of goods, since the Roswell and Area 51 e-juices
 18 mentioned in the email are from Plaintiff).

- 19 • March 8, 2017 – “Good afternoon! You spoke with one of our employees
 20 here at Crystal Vapor regarding Alien Vape E-liquids. I would like to
 21 inquire about the availability of any **Smok Alien hardware** that you also be
 22 selling. Thank you for your time and consideration. Hope to hear from you
 23 very soon! Crystal Vapor”

24 (Demonstrating retailer confusion between Plaintiff’s and Smok’s brands).

- 25 • March 15, 2017 – “I have had my set up for less than a month and the lights
 26 have stopped working. My screen is blank but it would still let me vape.”
- 27 • March 19, 2017 – “My vape was hitting fine 1 second I put it down and 5
 28 minutes later the screen is black and doesn't fire but can still be read by the

computer”

(Again, demonstrating confusion with Smok’s infringing devices).

- March 21, 2017 – “I purchased an order of two juice bottles on the 7th of march, I was wondering if you could let me know how much more time it will take for it to arrive. I've never ordering online with you before and I'm really just curious. I am quite happy with he Alien220W TC by the way, great product!”
- March 23, 2017– “The display on my Alien 220w mod stopped working. What could I have done? It's about 2 months old. I replaced the batteries with no luck. It still works, however. Thank you”

(Showing confusion between Plaintiff’s and Smok’s Alien brands).

83. To this day, the Smok Defendants and the Distributor Defendants continue to advertise and sell products using the infringing “Alien Baby” and “Alien Kit” trademarks.

84. The Smok Defendants and the Distributor Defendants must now answer for their infringing conduct, which will include an injunction barring all future sale or advertisement of the Alien Kit and the AL85 “Alien Baby” products, Plaintiff’s actual damages, the disgorgement of 100% of Defendants’ profits to Plaintiff, and enhanced damages for the Defendants’ willful infringement.

Distributor Defendants’ Intentional Interference with the Settlement Agreement between Plaintiff and Smok Defendants

85. The Distributor Defendants were aware of Settlement Agreement between Smok and Plaintiff. Upon information and belief, the Distributor Defendants encouraged Smok to breach the Settlement Agreement with Plaintiff so that the Distributor Defendants would be free to sell and advertise e-cigarette products under brand names containing the term “Alien Baby.” Distributor

1 Defendants induced Smok to breach the Settlement Agreement by continuing to
2 use the infringing name “Alien Baby” to promote Smok’s vaporizer, even after
3 Smok had notified Distributor Defendants that it had changed the name of this
4 product to AL85.

5 86. Distributor Defendants’ use of the term “Alien Baby” to promote Smok’s
6 vaporizer made Smok’s continued performance under the Settlement Agreement
7 very difficult, as Section 3.2.3 of the Settlement Agreement prohibited Smok from
8 using the word “Alien” to promote any of its e-cigarette products without
9 Plaintiff’s prior written consent. Distributor Defendants’ continued use of the term
10 “Alien Baby” was willful and intended to disrupt, and did disrupt, the contractual
11 relationship between Plaintiff and Smok.

12 87. The Distributor Defendants were also aware that the Settlement
13 Agreement prohibited Smok from challenging Plaintiff’s ALIEN VAPE® Marks.
14 Distributor Defendants further interfered with Smok’s performance under the
15 Settlement Agreement by encouraging Smok to challenge the validity and
16 enforceability of Plaintiff’s ALIEN VAPE® Marks. Since at least April 2017,
17 Distributor Defendants have repeatedly demanded that Smok seek to invalidate
18 Plaintiff’s ALIEN VAPE® Marks and have communicated with Smok about
19 strategies for doing so.

20 88. Distributor Defendants’ communications with Smok about challenging
21 the validity and enforceability of Plaintiff’s ALIEN VAPE® Marks prompted
22 Smok to file a trademark application in the United States for the mark “Smok
23 Alien Kit” on April 13, 2017.

24 89. Those communications also knowingly prompted Smok to breach the
25 Settlement Agreement and challenge the validity of Plaintiff’s ALIEN VAPE®
26 Marks by, among other things, filing a counterclaim for invalidity and cancellation
27 of the ALIEN VAPE® Marks and working with other third parties such as Alien
28 Visions E-Juice to challenge the validity and enforceability of the ALIEN VAPE®

1 Marks.

2 90. The foregoing intentional acts of interference by Distributor Defendants
3 disrupted the contractual relationship between Plaintiff and Smok. Specifically,
4 Distributor Defendants induced Smok to breach Section 3.2.3 of the Settlement
5 Agreement by continuing to use the “Alien Baby” name to sell and promote
6 Smok’s Al85 vaporizer. Distributor Defendants also induced Smok to breach
7 Section 3.2.1 of the Settlement Agreement by encouraging Smok to file the “Smok
8 Alien Kit” trademark application and likewise induced Smok to breach Section 8,
9 by encouraging Smok to challenge the validity and enforceability of Plaintiff’s
10 marks.

11 91. As a result of Distributor Defendants’ intentional acts of interference and
12 the resulting breaches of the Settlement Agreement, Plaintiff suffered damages,
13 including loss of revenue that Plaintiff was entitled to receive under the Settlement
14 Agreement, as well as loss of goodwill of Plaintiff’s business and ALIEN VAPE®
15 Marks resulting from the breach of the Settlement Agreement.

16 **FIRST CAUSE OF ACTION**

17 **(Federal Trademark Infringement Under 15 U.S.C. § 1114)**

18 **(Against all Defendants)**

19 92. Plaintiff repeats and re-alleges each and every allegation above as if fully
20 set forth herein.

21 93. Plaintiff is the sole owner of the ALIEN VAPE® Marks, which are
22 registered to Plaintiff on the Principal Register at the USPTO. These registrations
23 constitute prima facie evidence that the ALIEN VAPE® Marks are valid; that they
24 are owned by Plaintiff; and that Plaintiff has the exclusive right to use the ALIEN
25 VAPE® Marks in commerce in connection with the goods specified in the ALIEN
26 VAPE® Registrations.

27 94. Furthermore, Plaintiff has continuously used the ALIEN VAPE® Marks
28

1 in commerce since 2008. Meanwhile, on information and belief, the Defendants
2 began their infringement of the ALIEN VAPE® Marks by using the ALIEN
3 VAPE® Marks in commerce after the Plaintiff began using his marks. Therefore,
4 Plaintiff clearly has priority of use of the ALIEN VAPE® Marks as against the
5 Defendants. As such, for at least this additional reason, Plaintiff is the owner of the
6 ALIEN VAPE® Marks, and has the exclusive right to use the marks in commerce.

7 95. The Defendants' infringement of the ALIEN VAPE® Marks, in the
8 manner set forth above, supra, trades on the ALIEN VAPE® Marks and the
9 goodwill associated therewith, and is likely to confuse and deceive the consuming
10 public into believing that the Defendants are associated with ALIEN VAPE®
11 and/or Plaintiff.

12 96. The actions of the Defendants complained of herein are likely to cause
13 confusion, to cause mistake or to deceive others into erroneously believing that the
14 Defendants' goods are authorized by, licensed by, sponsored by, endorsed by, or
15 otherwise associated with ALIEN VAPE® and/or Plaintiff. The likelihood of
16 confusion is particularly strong because, inter alia, (i) the ALIEN VAPE® Marks
17 are strong due to Plaintiff's extensive use of the marks since 2008 and therefore
18 carry a high degree of consumer recognition; (ii) Plaintiff's mark ALIEN VAPE®
19 and the designations used by the Defendants, "Alien Baby" and "Alien Kit", are
20 highly similar; and (iii) both the Defendants and Plaintiff use the marks in
21 connection with identical or highly-related vaping products; (iv) the Defendants
22 and Plaintiff share the same marketing and trade channels; and (v) on information
23 and belief, concurrent use of the marks by the Defendants and Plaintiff has already
24 resulted in actual confusion among consumers.

25 97. In view of the foregoing, and on information and belief, the acts and
26 conduct of the Defendants complained of herein constitute willful and deliberate
27 infringement of Plaintiff's ALIEN VAPE® Marks in violation of Section 32 of the
28 Lanham Act, 15 U.S.C. 1114.

1 98. By reason of the foregoing, Plaintiff has been damaged and is being
 2 damaged by the Defendants' willful infringement of the ALIEN VAPE® Marks.
 3 Therefore, pursuant to 15 U.S.C. § 1117(a), Plaintiff is entitled to recover at least
 4 (i) the Defendants' profits gained from their infringement; (ii) Plaintiff's damages
 5 suffered due to the Defendants' infringement; and (iii) Plaintiff's costs in this
 6 action.

7 99. Moreover, Plaintiff has been and will continue to be, irreparably injured
 8 by the continued infringing acts of the Defendants, until and unless such acts are
 9 enjoined. Plaintiff has no adequate remedy at law. Therefore, in addition to the
 10 foregoing, the Defendants should be preliminarily and permanently enjoined from
 11 their infringing acts under 15 U.S.C. § 1116.

12 **SECOND CAUSE OF ACTION**

13 **(False Designation of Origin Under 15 U.S.C. § 1125(a))**

14 **(Against all Defendants)**

15 100. Plaintiff repeats and re-alleges each and every allegation above as if
 16 fully set forth herein.

17 101. The Defendants' use of the infringing "Alien Baby" and "Alien Kit"
 18 marks has resulted in and continues to result in confusion, mistake and deception
 19 among consumers as to the source of origin of Plaintiff and Smok's products.

20 102. Through the Settlement Agreement between Plaintiff and Smok, and
 21 from numerous emails between Plaintiff and Smok expressly discussing their
 22 infringement, Smok was aware at least as early as August 2016 of Plaintiff's prior
 23 rights to the ALIEN VAPE® Marks.

24 103. Through explicit notification by Smok and through Smok's revised
 25 advertising and marketing materials, the Distributor Defendants were aware as
 26 early as January 2017 that Smok was no longer referring to the AL85 by the
 27 infringing "Alien Baby" mark.
 28

104. By having actual and constructive knowledge of Plaintiff's rights and trademarks and continuing to use the infringing "Alien Baby" and "Alien Kit" marks, the Defendants have, without consent of Plaintiff, willfully violated 15 U.S.C. § 1125(a).

105. The Defendants have done and are continuing to do so with the intent to unfairly compete against Plaintiff, to trade upon Plaintiff's reputation and goodwill by causing confusion and mistake among consumers and the public, and to deceive the public into believing that the e-cigarette products being sold by the Defendants are associated with, sponsored by, or approved by Plaintiff, when they are not.

106. The Defendants' aforementioned acts and statements have caused damages to Plaintiff in an amount to be proven at trial.

107. Plaintiff is also being irreparably injured. Such irreparable injury will continue unless the Defendants are permanently enjoined by this Court from further violation of Plaintiff's rights, for which Plaintiff has no adequate remedy at law.

THIRD CAUSE OF ACTION

(California Statutory Unfair Competition, Cal. Bus. & Prof. Code § 17200)

(Against all Defendants)

108. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

109. By virtue of the acts complained of herein, the Defendants have intentionally caused a likelihood of confusion among consumers and the public and has unfairly competed with Plaintiff in violation of Cal. Bus. & Prof. Code § 17200, *et seq.*

110. The Defendants' acts constitute unlawful, unfair, malicious or fraudulent business practices, which have injured and damaged Plaintiff.

111. As a direct and proximate result of the Defendants' acts, Plaintiff has

1 suffered and will suffer great harm in an amount to be determined at trial. Plaintiff
 2 has also been irreparably injured. Plaintiff will continue to be irreparably damaged
 3 unless Defendants are enjoined from further committing unfair and unlawful
 4 business practices against Plaintiff.

5 6 **FOURTH CAUSE OF ACTION**

7 **(Common Law Trademark Infringement)**

8 **(Against all Defendants)**

9 112. Plaintiff repeats and re-alleges each and every allegation above as if
 10 fully set forth herein.

11 113. The Defendants have caused a likelihood of confusion among the
 12 purchasing public in this District and elsewhere, thereby infringing Plaintiff's
 13 common law trademark rights.

14 114. Plaintiff is being irreparably injured. Such irreparable injury will
 15 continue unless the Defendants are permanently enjoined by this Court from
 16 further violations of Plaintiff's rights.

17 18 **FIFTH CAUSE OF ACTION**

19 **(California Common Law Unfair Competition)**

20 **(Against all Defendants)**

21 115. Plaintiff repeats and re-alleges each and every allegation above as if
 22 fully set forth herein.

23 116. The Defendants have caused a likelihood of confusion among the
 24 purchasing public in this District and elsewhere, thereby infringing Plaintiff's
 25 trademark rights, in violation of the common law of the State of California.

26 117. Plaintiff is being irreparably injured. Such irreparable injury will
 27 continue unless the Defendants are permanently enjoined by this Court from
 28 further violations of Plaintiff's rights.

SIXTH CAUSE OF ACTION

(Breach of Contract)

(Against the Smok Defendants)

118. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

119. Plaintiff and Smok entered into the Settlement Agreement on October 28, 2016, to settle matters related to Smok's infringement of the ALIEN VAPE® Marks.

120. Plaintiff has fully performed or tendered all performances required by the Settlement Agreement.

121. Smok has breached their obligations in clause 3.1.1 of the Settlement Agreement by failing to pay Plaintiff \$15,000 per month for Plaintiff's e-liquid products.

122. Smok has breached their obligations to Plaintiff in clauses 3.1.2 through 3.1.7 of the Settlement Agreement by failing to adhere to the advertising requirements set forth, including the placement of an ALIEN VAPE® banner ad on the first slide of the front page of the Smok website www.smoktech.com, regular social media postings.

123. Smok has breached their obligations under clause 3.1.9 and 3.1.10 of the Settlement Agreement by failing to resell and distribute Plaintiff's Alien Vape e-liquid.

124. Smok also breached the contract by introducing a second "Alien" branded e-cigarette product (the "Alien Baby"), in direct violation of clause 3.2.

125. Smok also breached clause 3.2.2 of the Settlement Agreement by applying to register trademarks containing the term "Alien" for e-cigarette products, including filing trademark applications in the United States and in China for "Alien Kit" for electric cigarettes.

1 126. Smok also breached clause 8 of the Settlement Agreement by
 2 challenging the validity and enforceability of Plaintiff's Alien Vape Marks,
 3 including by filing a counterclaim in this action to cancel Plaintiff's Alien Vape
 4 Marks. In addition, Smok has breached clause 8 by supporting, aiding, and
 5 assisting third parties, including the Distributor Defendants, in contesting the
 6 validity and enforceability of Plaintiff's Alien Vape Marks.

7 127. Smok's numerous breaches go to the heart of the Settlement
 8 Agreement and, accordingly, Plaintiff is entitled to terminate the contract, to
 9 collect the agreed-upon damages, and to recover any additional damages directly
 10 and proximately caused by Smok's breach, including interest.

11 128. As a direct and proximate result of the Smoke Defendants' acts,
 12 Plaintiff has suffered and will suffer great harm in an amount to be determined at
 13 trial.

14 **SEVENTH CAUSE OF ACTION**

15 **(Contributory Trademark Infringement)**

16 **(Against the Smok Defendants)**

17 129. Plaintiff repeats and re-alleges each and every allegation above as if
 18 fully set forth herein.

19 130. The Distributor Defendants are engaged in illegal trademark
 20 infringement of Plaintiff's ALIEN VAPE® Marks in that they each sell, offer for
 21 sale, promote, and advertise, infringing Alien Baby and Alien Kit e-cigarette
 22 products.

23 131. The Smok Defendants have actual knowledge of the Distributor
 24 Defendants' illegal activities.

25 132. The Smok Defendants have materially encouraged, enabled,
 26 contributed to, and induced the infringing conduct of the Distributor Defendants by
 27 providing, among other things, the infringing products to the Distributor
 28 Defendants and encouraged them to sell, market, and promote them.

133. The Smok Defendants therefore bear contributory liability for the Distributor Defendants' trademark infringement of Plaintiff's ALIEN VAPE® Marks.

EIGHTH CAUSE OF ACTION

(Breach of the Implied Covenant of Good Faith and Fair Dealing)

(Against the Smok Defendants)

134. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

135. Plaintiff and Smok entered into the Settlement Agreement on October 28, 2016, to settle matters related to Smok's infringement of the ALIEN VAPE® Marks. Every contract imposes the duty of good faith and fair dealing upon the parties in the enforcement of the contract.

136. Smok has breached the implied covenant of good faith and fair dealing by refusing to use good-faith efforts to promote and sell Plaintiff's Alien Vape-branded e-liquid, as required by the Settlement Agreement. Smok's willful refusal to promote and sell Plaintiff's Alien Vape-branded e-liquid has deprived Plaintiff of the benefits that Plaintiff was entitled to receive under the Settlement Agreement.

137. Smok has also breached the implied covenant of good faith and fair dealing by sending its letter, dated May 31, 2017, announcing that it is terminating the Settlement Agreement. The Settlement Agreement says that it cannot be terminated and that its provisions continue to remain in effect after the Distribution Term ends. By its letter of May 31, 2017, Smok willfully refused to perform under the Settlement Agreement, even though Plaintiff performed its obligations under the agreement, and unfairly interfered with Plaintiff's right to receive the benefits of the contract.

138. Smok has also breached the implied covenant of good faith and fair dealing by conspiring with Distributor Defendants to challenge the validity and

1 enforceability of Plaintiff's ALIEN VAPE® marks, including by filing a United
 2 States trademark application for the mark "Smok Alien Kit" on April 13, 2017,
 3 despite expressly agreeing not to engage in such conduct under the Settlement
 4 Agreement. By willfully engaging in the foregoing conduct, Smok has deprived
 5 Plaintiff of the benefits Plaintiff was entitled to receive under the Settlement
 6 Agreement.

7 139. Smok's breaches of the covenant of good faith and fair dealing have
 8 proximately and directly caused damages to Plaintiff.

9 **NINTH CAUSE OF ACTION**

10 **(Intentional Interference with Contractual Relations)**

11 **(Against the Distributor Defendants)**

12 140. Plaintiff repeats and re-alleges each and every allegation above as if fully
 13 set forth herein.

14 141. The Settlement Agreement created an enforceable contractual relationship
 15 between Plaintiff and Smok. The Distributor Defendants were aware of the
 16 Settlement Agreement between Plaintiff and Smok.

17 142. The Distributor Defendants' aforementioned intentional acts, including
 18 their continued use of the term "Alien Baby" to promote Smok's products and their
 19 encouragement and assistance with Smok's efforts to invalidate Plaintiff's "Alien
 20 Vape" marks, by, *inter alia*, filing a trademark application for "Smok Alien Kit,"
 21 were designed to and did induce a disruption of Plaintiff's contractual relationship
 22 with Smok.

23 143. As a direct and proximate result of Distributor Defendants' conduct,
 24 Plaintiff has suffered irreparable harm to its business, goodwill and reputation,
 25 including monetary damages the amount of which will be proven at trial.

26 144. The acts of Distributor Defendants, as described above were and are
 27 willful, wanton, malicious and oppressive, and justify an award of punitive
 28

1 damages.

2 **PRAYER FOR RELIEF**

3 WHEREFORE, Plaintiff demands a judgment against the Defendants and
4 prays that this Court grants:

- 5 a. Permanent injunctive relief against all Defendants and their parents,
6 subsidiaries, affiliated companies, and their respective officers, directors,
7 employees, and agents from using the Alien trademarks, any marks likely
8 to cause confusion with the Alien trademarks, and selling any of the Alien
9 Baby/AL85 and Alien Kit vaporizer products;
- 10 b. An accounting of, and disgorgement of, any and all profits derived by the
11 Defendants and all damages sustained by Plaintiff, trebled, by virtue of the
12 Defendants' infringing and illegal acts, in an amount to be determined at
13 trial;
- 14 c. Prejudgment interest, the costs of this action, witness fees, and Plaintiff's
15 attorneys' fees, pursuant to the Settlement Agreement between Plaintiff and
16 the Smok Defendants, 15 U.S.C. § 1117, 1118, and California Civil Code
17 § 3288;
- 18 d. Punitive, enhanced, treble, and exemplary damages for the Defendants' acts
19 of unfair competition and willful infringement;
- 20 e. The agreed-upon damages set forth in the Settlement Agreement between
21 Plaintiff and the Smok Defendants;
- 22 f. That Plaintiff recover compensatory damages for Smok Defendant's
23 breach of the Settlement Agreement, including incidental damages and
24 consequential damages to Plaintiff's business;
- 25 g. That Plaintiff recover the costs of corrective advertising to remedy the harm
26 from consumer confusion;
- 27 h. Compensatory and punitive damages for Smok Defendants' breach of the
28 implied covenant of good faith and fair dealing;

- i. Compensatory and punitive damages for Distributor Defendants' intentional interference with the contractual relationship between Smok Defendants and Plaintiff;
- j. Other economic and consequential damages in an amount to be determined at trial;
- k. The destruction of all materials bearing infringements of Plaintiff's ALIEN VAPE® trademarks;
- l. That the Defendants be held jointly and severally liable;
- m. A judgment that the Defendants have unfairly competed with Plaintiff and violated the trademark laws of California and the United States; and
- n. Grant to Plaintiff such further relief as may be equitable and proper.

Respectfully submitted,

By: /s/ Stephen McArthur
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Dated: January 3, 2018

DEMAND FOR JURY TRIAL

Plaintiff hereby demands a jury trial pursuant to Rule 38 of the Federal Rules of Civil Procedure as to all issues in this lawsuit.

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Dated: January 3, 2018